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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1621

FRANK E. PELUSO, Administrator of the Estate of TERRY PELUSO, LOUIS J. PELUSO, JR., and PATSY A. PELUSO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No. .

FRANK E. PELUSO, ADMINISTRATOR OF THE ESTATE OF TERRY PELUSO, LOUIS J. PELUSO, JR., AND PATSY A. PELUSO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

There was no opinion filed by the United States District Court for the Eastern District of Pennsylvania. The Order and Judgment of the District Court is appended hereto (A1).

The Opinion of the Court of Appeals for the Third Circuit is not yet reported in the Federal Reporter but is appended hereto (A2-A4).

The Judgment of the Court of Appeals, entered on March 6, 1973 is appended hereto (A5-A6).

JURISDICTION.

This jurisdiction of this Court is involved under 28 U. S. C. § 1254(1) seeking review of the order of the United States Court of Appeals for the Third Circuit filed March 6, 1973 affirming the judgment of the United States District Court of the Eastern District of Pennsylvania.

STATEMENT OF THE QUESTION PRESENTED.

1. Whether the "incident to service" rule of *Feres v. United States,* 340 U. S. 135, should be reconsidered and restricted to injuries occurring directly in the course of service?

STATUTES INVOLVED.

This case arises under the Federal Tort Claims Act, 28 U. S. C. § 1346(b) which provides:

> Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Also applicable is 28 U. S. C. § 2680(j), (k) which provide:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . .
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country.
>
> . . .

STATEMENT OF THE CASE.

Private (E-2) Terry Peluso, Jr., was, at the time of his death a member of the New Hampshire National Guard on active duty at Fort Dix, New Jersey. On August 23, 1970, Private Peluso, suffering from nausea, stomach pains and continued vomiting was admitted for observation to Walson Army Hospital at Fort Dix. Despite the fact that his illness had persisted for a week and had twice been unsuccessfully treated at out-patient facilities, personnel at the hospital diagnosed his condition as a simple upper respiratory infection necessitating no special treatment of any kind. Terry remained in the hospital's URI Ward until August 29, during which time he was occasionally given injections to deter vomiting and assigned policing detail in the wards ranging from bedmaking to garbage disposal.

On August 29, 1970, Terry was discharged from the hospital. His vomiting persisted, however, and, as in the past, he was unable to retain any meals despite injections given him to control the problem.

Private Peluso's return to duty lasted only until Sunday, August 30, 1970, when he again sought medical attention. For the second time he was admitted to the hospital and again assigned to the URI Ward. No special treatment was prescribed for him despite the fact that he had lost over twenty pounds in the last two weeks. He complained of high temperature, vomiting and stomach discomfort. On September 4, 1970, Terry's temperature rose to 103°, his pulse rate increased and his blood pressure dropped markedly. He was finally transferred to the surgical intensive care unit and, apparently for the first time during his hospital course, consideration was given to the possibility of appendicitis. On that same day he underwent abdominal laparotomy. The operation revealed that Terry

was not only suffering from acute suppurative appendicitis but was also afflicted with diffuse peritonitis.

On September 7, 1970, Private Peluso's parents were first advised that their son had undergone major surgery and was in the Intensive Care Unit. Notification came not from the Army but from one of Terry's friends. Private Peluso himself had been unaware that the Army proposed to operate on him. Instead he was advised that he was merely being taken for X-rays.

Private Peluso's condition did not improve. By this time he was receiving transfusions of whole blood. Blood and fecal matter were observed to be draining from the surgical incision.

An exploratory laparotomy was undertaken as a life-saving matter on the eleventh of September. The operation disclosed diffuse peritonitis, multiple abcesses and fecal matter in the peritoneal cavity. Approximately three quarts of blood and pus were removed from Terry's abdominal cavity. A perforated area five centimeters in diameter was discovered in his liver. An end-to-end anastomosis and a colostomy were immediately performed in an attempt to rectify his condition.

Three days later, Private Peluso experienced cardiac arrest. Attempts to resuscitate him were unsuccessful and he was pronounced dead at 7:30 p.m. The Death Certificate listed the cause of death as acute peritonitis due to a perforated hepatic flexure, secondary to a perforated appendix.

On March 10, 1971, an administrative claim was submitted by Private Peluso's parents seeking damages for the death of their son. This claim was perfunctually denied by the United States Army Claims Service on March 26, 1971. As already stated this suit followed and the Complaint was dismissed.

The dismissal of the Complaint by the District Court was appealed to the Court of Appeals for the Third Circuit.

The Court of Appeals affirmed the judgment of the district court. In its opinion the Court of Appeals stated:

> The appellant argues quite forcibly that the rationale of *Feres* was abandoned by the Supreme Court when it held in *Brown v. United States,* 348 U. S. 110 (1954), that a veteran could recover for the negligent aggrevation by Veteran's Administration Hospital personnel of a service incurred injury, and in *United States v. Muniz,* 374 U. S. 150 (1963), that federal prison inmates could recover for injuries caused by the negligence of prison supervisors. If the matter were open to us we would be receptive to appellants' argument that *Feres* should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service. But the case is controlling. Only the Supreme Court can reverse it. . . . Certainly the facts pleaded here, if true, cry out for a remedy.

Directed by the Court of Appeals to the Supreme Court of the United States, petitioners seek here a remedy by writ of certiorari.

REASONS FOR ALLOWING WRIT.

I. The Bases of the "Incident to Service" Rule of *Feres v. United States*, 340 U. S. 135, Have Been Substantially Eroded, So the Rule Should Be Re-Examined by This Court in the Light of Present Circumstances.

The Federal Tort Claims Act, 28 U. S. C. § 1346(b) (1964) provides that the district courts shall have jurisdiction over civil actions or claims against the United States for injury or death

> "caused by the negligent or wrongful act or omission of any employee of the government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

There are thirteen statutory exceptions to this Act listed in 28 U. S. C. § 2680. A judicially-legislated exception was created by *Feres v. United States*, 340 U. S. 135 (1950), which held that a *serviceman injured or killed incident to his service was entitled to no recovery under the Federal Torts Claims Act.*

The Supreme Court premised its decision in *Feres* on four principal grounds: that there was other adequate compensation; that there was no analogous private liability; that otherwise, military discipline would be adversely effected; and that servicemen have no freedom in their choice of habitat. Each of these criteria has been so eroded that *Feres* should now be re-examined.[1]

1. While some courts have found *Feres* has not been eroded, they fail to explain why or how it is valid. See e.g. *Dilworth v. United States*, 387 F. 2d 590 (E. D. Pa. 1967).

A. The Rationale of Other Adequate Compensation, as Recognized by Subsequent Decisions, Is Not Defensible.

Although the existence of a comprehensive system of compensation within the armed services was one reason for the Court's denial of recovery to the plaintiffs in *Feres*, the Court's decisions both prior and subsequent to *Feres* cast doubt on the validity of this rationale. In *Brown v. U. S.*, 348 U. S. 110 (1954), for example, a veteran was held entitled to receive compensation for a service-connected injury which was aggravated, after his discharge, by the negligence of operating personnel in a Veteran's Administration Hospital. The Court there said that the existence of disability compensation under veterans' acts would not preclude recovery under the Federal Tort Claims Act. In *United States v. Muniz*, 374 U. S. 150 (1963), two federal inmates sued under the Act for injuries sustained as the result of the negligence of supervisory personnel. Chief Justice Warren stated that "the presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence" under the Tort Claims Act. In *United States v. Brooks*, 337 U. S. 49 (1949) neither the availability nor the recovery of statutory benefits was held to be a bar to recovery by a serviceman, but was instead applied to reduce the *extent* of such recovery.

Moreover the "other adequate compensation" rationale is not defensible. The *Feres* Court held the compensation laws were exclusive and preclude claims brought under the Federal Torts Claim Act. It found the "enactments by Congress provide systems of simple, certain, and uniform compensation." 340 U. S. at 144. From the generous and comprehensive nature of these systems, the Court concluded that Congress did not intend to confer an additional, or

overlapping, benefit for servicemen. This decision seems to be an analogy to workmen's compensation statutes with their implicit exchange of tort recovery for liability without fault. The history of soldier's benefits and the Federal Tort Claims Act, however, detract from the validity of the "bargain" rationale. Unlike workmen's compensation, benefits to military personnel are essentially acts of sovereign grace. See e.g. *Donnelly v. U. S.*, 17 Ct. Cl. 105, 108 (1881). None of the laws are expressly designated as exclusive remedies. Furthermore, the analogy is not satisfactory because the serviceman is without the power to terminate his status at will and because military service is more often compulsory rather than elective.

If benefits were intended as a universal substitute for tort recoveries by soldiers, they should be equivalent to recoveries allowed in private suits. Yet, the financial extent of benefits usually falls short of the damages awardable to a non-military claimant. This is particularly true in wrongful death actions. The discrepancy is strikingly illustrated by the facts in *Brooks*. There the death of Arthur Brooks brought a $468 death gratuity (six months pay) to his mother, plus the value of his burial paid for by the Army. The parents' application for a pension was denied because they failed to prove dependency upon the deceased son. Even when the service life insurance (which was $5,000 at that time)—which Arthur Brooks had paid for himself—is added to the award, the total compensation for this wrongful death is far below the $25,000 judgment that the District Court awarded to the estate.

B. The Rationale of No Analogous Private Liability.

The Federal Tort Claims Act provides the United States shall be liable "in the same manner and to the same

extent as a private individual under like circumstances." 28 U. S. C. § 2674. The Court in *Feres v. U. S.*, 340 U. S. 135, further based its decision on the absence of a private analogy to serve as predicate for government liability, stating that the effect of the Act is "to waive immunity from recognized causes of action not to visit the Government with novel and unprecedented liability". 340 U. S. at 142. This reasoning has subsequently been abandoned by the Supreme Court and therefore, is no longer valid.

The rationale of no analogous private liability has been consistently eroded. From the hesitant steps taken toward abandonment in *Dalehite v. U. S.*, 346 U. S. 15 (1953), to *Indian Towing Co., Inc. v. U. S.*, 350 U. S. 61 (1955), the Court in *Rayonier Inc. v. U. S.*, 352 U. S. 315 (1957) overturned this rationale and replaced it with the test of "whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." 352 U. S. at 319. In other words, the test is not whether a private individual has the power to conscript or mobilize a private army with such authorities over persons as the Government has and would be liable under local law as a member, but whether he would therefore be liable as an individual. A military doctor would be liable for a failure to exercise the standard of care required of private doctors. The fact that he was a military doctor might be relevant in determining negligence, but not liability. The Court in *Rayonier, Inc. v. U. S.*, 352 U. S. 315 (1957), appears to have referred directly to *Feres*, stating that it:

> "may be 'novel and unprecedented' to hold the United States accountable for the negligence of its fire fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish 'novel and unprecedented' governmental liability." (p. 319).

In *United States v. Muniz*, 374 U. S. 150, 159 (1963), the Court expressly negated this aspect of *Feres v. U. S.*, 340 U. S. 135, citing *Rayonier, Inc. v. United States*, 352 U. S. 315 (1957) and *Indian Towing Co. v. United States*, 350 U. S. 61 (1955), when it said: "the Government's liability is no longer restricted to circumstances in which government bodies have traditionaly been responsible for misconduct of their employees."

C. The Rationale of Discipline and of "Distinctly Federal" Does Not Withstand Scrutiny.

The third basis for the Court's decision in *Feres v. U. S.*, 340 U. S. 135 (1950), was that the "distinctly federal" character of the relation between the government and the military should bar claims that arise incident to military service. It emphasized that claims under the Act would have an adverse effect on military discipline. Upon examination, this rationale does not withstand scrutiny.

The Court's notion that the Government-soldier relationship was "special and unique" appears to be concerned with the terms of the special protection accorded in the form of benefits. The difference, however, in the aims and application of compensation and the Federal Tort Claims Act remedy, and the inadequacy of compensation in wrongful death cases cast doubt on the conclusiveness of this factor.

While the soldier is subject at all times to military law and discipline, and is without power to terminate his status, he is still a citizen. For the most part, his military status does not relieve him of his rights and duties. Further, the increasing interaction in modern society between civilian and military spheres leaves little reason for discriminating against soldiers except in those facets of life which are "peculiarly military" in nature.

The Court felt that allowing servicemen to sue under the Federal Tort Claims Act would open the door to a flood of litigation and as a result it would seriously affect military discipline and morale. This is not a real problem for various reasons. The Act itself specifically prohibits all claims arising during actual combat and any claim arising in a foreign country. 28 U. S. C. § 2680(j) and (k). All claims based on discretionary action are also barred. 28 U. S. C. § 2680(a). Also the Act provides that all claims for less than $2,500 may be handled by a federal administrative agency. 28 U. S. C. § 2672. It is very likely that most claims would be within this monetary category since an injured serviceman usually incurs no medical expenses nor suffers any loss of wages. Therefore, only claims for wrongful death, not the result of discretionary action, remain. These suits are not a flood of litigation.

Allowing claims will not frustrate the necessary respect for military command echelons. This fear might be justified if a soldier's action were against the individual officer or fellow-soldier responsible for the injury; but the imposition of liability upon the Government seems too remote from the individual relationship to cause any substantial subversion of discipline or morale. Any detrimental effect would hardly be so disastrous to warrant the prohibition of all military tort claims.

D. Rationale of Lack of Freedom to Choose Own Habitat Was Only a Makeweight and Has Not Barred Similar Actions.

The *Feres* Court was also concerned with the fact that soldiers' rights would vary substantially according to the place of assignment, a matter over which the soldier would have little control. And since the Federal Torts Act, 28

U. S. C. § 1346(b) makes ". . . the law of the place where the act or omission occurred" govern the any consequent liability, the Court felt they should exclude claims by servicemen incident to their service. This reasoning has not withstood subsequent decisions. In *United States v. Muniz,* 374 U. S. 150 (1963) two federal prison inmates, who had no control over their location, were allowed to sue under the Federal Tort Claims Act. The Court there said, ". . . though the Government expresses some concern that the nonuniform right to recover will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more." 374 U. S. at 162. *Muniz* directly contradicts the "place of the injury" rationale. Further, in *United States v. Lee,* 400 F. 2d 558 (9th Cir. 1968), cert. denied, 393 U. S. 1053 (1969), the court found that this reasoning was not important.

Doubt is also cast on this rationale by cases which allow servicemen's dependents to recover under the Act. Even though the federal district court in *Grigalauskas v. U. S.,* 103 F. Supp. 543 (D. Mass. 1951) distinguished *Feres* because a military dependent "is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury", there is doubt whether this is true in practice. When a serviceman is stationed within the United States, the serviceman's family often accompanies him to his place of duty. The military, in many instances, provides housing for the serviceman and his family. It is more likely that the dependent's choice of habitat is controlled by the habitat of the serviceman himself.[2]

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2. Predicating relief upon the outdated notion of lex loci delictus also seems suspect in view of the present approach taken in conflicts of law. That traditional rule was severely criticized and then replaced by the "interest analysis" approach expostulated by Bernard Currie.

II. The "Incident to Service" Principle of *Feres v. United States* Has Been So Expanded That It Is Now an Arbitrary Standard Which Is Creating Significant Conflict Among the Decisions of Numerous Federal Courts of Appeals, and Which Should Therefore Be Re-Examined by This Court and Restricted to Injuries Occurring Directly in the Course of Service.

The Supreme Court in *Feres v. U. S.*, 340 U. S. 135 (1950) carefully distinguished *Brooks v. U. S.*, 337 U. S. 49 (1949), to permit actions to be brought that were not "incident to service". This exception has been extended beyond any apparent contemplation of the Supreme Court. Now, if the claimant is a serviceman, his action is invariably dismissed as incident to service. Thus, *Brooks* does not have the relevance the Supreme Court intended. As such, the rule is no longer a feasible standard to bar actions brought under the Federal Tort Claims Act.

The lower federal courts have adopted a purely mechanical approach in dealing with military claims under the Federal Tort Claims Act. Under this approach the "incident to service" test has degenerated into an inquiry whether the claimant was a serviceman when the injury was sustained. In *Gursley v. U. S.*, 232 F. Supp. 614 (D. Colo. 1964), recovery was denied in an action for property damage caused by an explosion which destroyed the plaintiff's on base quarters while he was on a three-day pass. The court held that *Feres* barred the suit. The unreported decision after remand in *Hale v. U. S.*, 416 F. 2d 355 (6th Cir. 1969), found that a serviceman who was on pass and was hitchhiking back to camp was acting incident to his service. Hale was injured by a private automobile when getting into a military truck which had offered him a ride back to post. See *Zoula v. U. S.*, 217 F. 2d 81 (5th Cir. 1954) wherein it was considered irrelevant that military students touring an Army base were not "injured as a

result of, or while acting under, immediate and direct military orders". See also *Archer v. U. S.*, 217 F. 2d 548 (9th Cir. 1954), cert. denied, 348 U. S. 953 (1955), where parents of a West Point Cadet, killed when a military transport in which he was riding gratis while returning from leave crashed, were denied recovery. Lack of re-restraint in extending the "incident to service" rule has created a *per se* bar of actions by servicemen.

Clearly, therefore, the "incident to service" standard is one that is particularly susceptible to arbitrary application. Consequently, the standard has been the cause of extensive confusion and inconsistency among the decisions of the lower federal courts.

Feres has created more litigation than any of the statutory exceptions to the Federal Tort Claim Act. These cases base their decisions on any of the several factors of the *Feres v. U. S.*, 340 U. S. 135 (1950). Because various courts have stated that one aspect or another is inconsequential, there is now no single factor which is still valid. Similar fact situations result in conflicting holdings. Even the three primary Supreme Court cases dealing with the "incident to service" rule have been subject to conflicting interpretations. Only reexamination of a serviceman's right to sue under the Act will resolve the conflicting decisions of the lower federal courts concerning *Feres*.

The courts have stressed various phases of the principal Supreme Court cases dealing with serviceman's claims under the Federal Tort Claims Act: *Brooks v. U. S.*, 337 U. S. 49 (1949); *Feres v. U. S.*, 340 U. S. 135 (1950); *Brown v. U. S.*, 348 U. S. 110 (1954) Some courts have emphasized the military status of the serviceman at the time of injury. *Layne v. U. S.*, 190 F. Supp. 532 (S. D. Ind.), aff'd, 295 F. 2d 433 (7th Cir. 1961), cert. denied 368 U. S. 990 (1962); *Chambers v. U. S.*, 357 F. 2d 224 (8th Cir. 1966); *Callaway v. Garber*, 289 F. 2d 171 (9th Cir.), cert. denied,

368 U. S. 874 (1961); *Richardson v. U. S.*, 226 F. Supp. 49 (E. D. Va. 1964). Others have accentuated the exact location of the claimant at the time of injury. See e.g. *Orken v. U. S.*, 239 F. 2d 850 (6th Cir. 1956); *Sapp v. U. S.*, 153 F. Supp. 496 (W. D. La. 1957); *Gursley v. U. S.*, 232 F. Supp. 614 (D. Colo. 1964). Still others deny recovery on the ground of the availability to servicemen of a comprehensive system of compensation, in lieu of the Tort Claims Act. *Zoula v. U. S.*, 217 F. 2d 81 (5th Cir. 1954). Finally, courts have also stressed the peculiar and special relationship of the soldier to his superiors. *Lee v. U. S.*, 400 F. 2d 558 (9th Cir. 1969). Accordingly, *Brooks, Feres* and *Brown* have led the lower courts into confusion, inconsistency and uncertainty.

Federal courts also conflict on the relationship among *Brooks, Feres* and *Brown*. In *Zoula v. U. S., supra,* the court asserted that *Feres* controls and *Brooks* should be confined to its facts. The tribunal, in *Knecht v. U. S.*, 144 F. Supp. 786 (E. D. Pa. 1956), aff'd, 242 F. 2d 929 (3d Cir. 1957), found the two decisions to be entirely consistent. The court, in *Fass v. U. S.*, 191 F. Supp. 367 (E. D. N. Y. 1961), felt that *Brooks* and *Brown* were exceptions to *Feres*. And again, in *Lee v. U. S., supra, Brown* was said to explain *Feres*.

The resultant confusion surrounding *Feres* and the remainder of the trinity has produced factually inconsistent decisions. For instance, in *Brown v. U. S.*, 99 F. Supp. 685 (S. D. W. Va. 1951) and *Chambers v. U. S.*, 357 F. 2d 224 (8th Cir. 1966) the deceased servicemen drowned in a base swimming pool due to the negligence of employees of the federal government. Although the facts were similar, different decisions were rendered.[3] In cases involving property

3. In *Brown v. U. S.*, 99 F. Supp. 685 (S. D. W. Va. 1951), decedent's father recovered in both his wrongful death action and as administrator of decedent's estate. Yet, plaintiffs, in *Chambers v. U. S., supra,* were denied recovery.

damage, *United States v. United States Servs. Auto Ass'n.*, 238 F. 2d 364 (8th Cir. 1956), and *Lund v. U. S.*, 104 F. Supp. 756 (D. Mass. 1952), are factually consistent, but opposite in result.[4]

In addition to being vague, meaningless and conducive to factually inconsistent results, the rule's greatest evil is its pervasive scope and indiscriminate application. It is submitted that the "incident to service" exception is not a proper interpretation of the *Feres* doctrine. The rule should rather relate to situations "peculiarly military". Such situations arise out of the relationship of the soldier to his superiors and should encompass only those incidents directly involving discipline. "Peculiarly military" activities should include, for example, circumstances surrounding the soldiers' training, their normal duty assignments and the extra-duty instances, such as guard duty or kitchen patrol (K. P.), they are required to perform. They should not include damage to serviceman's property, or injuries to servicemen occurring while away from their assigned work but still on the military post. Nor should they include recreational activities, automobile accidents, or any off-duty incidents which are not directly controlled by one's superiors.

The opinion of the Court below, while emphasizing that a reconsideration of *Feres* is a matter for the Supreme Court, nonetheless indicated that a modification of the "incident to service" rule is desirable. The Court suggested that there is a persuasive argument for the position that *Feres* should be "restricted to injuries occurring directly in the course of service."

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4. An insurer, as subrogee, was denied recovery in *United States v. United States Servs. Auto Ass'n., supra,* for damage to a serviceman-insured's automobile while parked in a military lot caused by a crashing plane. In *Lund v. U. S., supra,* a reservist on active duty recovered for damage to his automobile parked in a military lot.

III. The "Incident to Service" Exception to the Federal Tort Claims Act Is Contrary to Legislative Intent in Enacting the Statute, and Should Therefore Be Re-Examined by This Court.

The Federal Tort Claims Act was enacted to provide a waiver of sovereign immunity for tort actions against the federal government. Recovery under the Act was specifically excluded by twelve exceptions, to which one exclusion was subsequently added. 28 U. S. C. Sec. 2680. Two specific provisions deal with servicemen. Subsection (j) excludes "any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war"; sub-section (k) prohibits "any claim arising in a foreign country".

The *Feres* Court read an additional exception into the Act. This judicially-legislated exception is contrary to Congressional intent and should be disregarded.

There are no explicit statements of Congressional intent in regard to the exclusion of claims by servicemen incident to their service. See H. R. Rep. No. 1287, 79th Cong., 1st Sess. (1946); Sen. Rep. No. 1400, 79th Cong., 2d Sess. (1946); and 86 Cong. Rec. 12015-32 (1940). To the contrary, the legislative history shows that Congress did not intend to exclude servicemen's claims. When the Act was first introduced to Congress, it provided that claims "arising out of the activities of the military or naval forces or of the Coast Guard during time of war" would be excluded. During enactment in Congress, the language was amended to exclude only "combatant activities". Of the eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two contained exceptions excluding relief to members of the armed forces. Therefore, because of this past history and the amendment adding the term "combatant", it appears obvious that Congress had considered and rejected the exclusion of members of the armed forces from the benefits of the Act.

The legislative history also shows that a thirteenth exception was also originally introduced to Congress, but not included in the final law. That exception provided that "Any claim for which compensation is provided by the . . . World War Veterans Act of 1924, as amended". The World War Veterans Act, 38 U. S. C. Sec. 701(a), provides disability benefits to "any person who served in the active military or naval service and who is disabled as a result of disease or injury . . . incurred *in the line of duty* of such service". Rejection of the thirteenth exception would evidence Congressional intention to include injuries received "incident to service" under the Act.[5]

Furthermore, the Courts' interpretation of Congressional intent failed to note the attack on *United States v. Brooks*, 169 F. 2d 840 (4th Cir. 1948), by Representative Emmanuel Celler, who, in an oral statement to the Yale Law Journal on November 26, 1948, said:

> "The opinion of the Fourth Circuit is utterly erroneous when it says that it was the intent of Congress to exclude a member of the Armed Forces from the benefits of the Tort Claims Act. I am the author of the bills, and I piloted it through the Subcommittee of the House Judiciary Committee, and the House—I had more to do with it than any other member. I never intended to preclude a suit by a soldier. Despite the fact that the latter might have various and sundry remedies for compensation, pensions, hospitalization, preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the Federal Tort Claims Act. The only place where soldiers were even mentioned was in a section that was cut out of the Act. We start off with the proposition in general that the Government deliberately

5. Any circumstance which is "incident to service" is incurred "in the line of duty". Judge Advocate General's School, "Claims by and Against the Government", pages 30, 31 (Text No. 8, 1945).

removes the defense of sovereignty, except in the cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The court cannot read the exceptions into the law."

Other factors indicate that the *Feres* Court did not comply with Congress' intent. The thirteen statutory exceptions to the Act related to the place or cause of injury rather than to the character of the claimant. Further, it is inconceivable that Congress would allow a soldier who had deserted or who was absent without leave to sue under the Act, while barring a soldier fulfilling his assigned military obligations. Yet this is the result under the *Feres* rule. It is not plausible to contend that Congress intended to relegate the soldier to an inferior or less privileged status as a tort claimant. The Act was drafted with skill and circumspection and at a time when Congress would hardly be said to have been unaware of the rights of servicemen. The Act was passed August 2, 1946, just before a Congressional election and less than a year after the end of World War II. The realities of politics make it reasonable to assume that Congress did not intend to exclude all servicemen from the coverage of the Act.

Wherefore for all the reasons stated above this Petition should be granted.

Respectfully submitted,

James J. McCabe, Jr.,
Richard A. Kraemer,
Duane, Morris & Heckscher,
Attorneys for Petitioners, Frank E. Peluso, Louis J. Peluso, Jr., and Patsy A. Peluso.

Appendix.

ORDER OF THE DISTRICT COURT.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 71-2226.

FRANK E. PELUSO, ADMINISTRATOR OF THE ESTATE OF TERRY PELUSO

v.

UNITED STATES OF AMERICA

AND

LOUIS J. PELUSO, JR. AND PATSY A. PELUSO

v.

UNITED STATES OF AMERICA.

Order Sur Motion to Dismiss Complaint.

AND Now, this 7th day of March, 1972, the Government's motion to dismiss plaintiff's complaint is hereby granted on the authority of *Feres v. United States,* 340 U. S. 135, 71 S. Ct. 153 (1950); *Dilworth v. United States,* 387 F. 2d 590 (3rd Cir. 1967); *Buckingham v. United States,* 394 F. 2d 483 (4th Cir. 1968); and *Henning v. United States,* 446 F. 2d 774 (3rd Cir. 1971).

By THE COURT:

J. WILLIAM DITTER, JR., *J.*

COURT OF APPEALS OPINION.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1379

FRANK E. PELUSO, ADMINISTRATOR OF THE ESTATE OF TERRY PELUSO, LOUIS J. PELUSO, JR., and PATSY A. PELUSO,

Appellants,

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Submitted Under Third Circuit Rule 12(6)
March 6, 1973.
Before: GIBBONS, HUNTER, *Circuit Judges,* and MUIR, *District Judge.*

JAMES J. McCABE, JR., Philadelphia, Pa.,
RICHARD A. KRAEMER, Philadelphia, Pa.,
Attorneys for Appellants

HARLINGTON WOOD, JR., Washington, D. C.,
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MORTON HOLLANDER, Washington, D. C.,
ROBERT M. FEINSON, Washington, D. C.,
Attorneys for the Appellee

Opinion of the Court.

(Filed March 6, 1973.)

PER CURIAM

This is an appeal from an order of the district court dismissing a complaint for failure to state a claim upon which relief may be granted. The suit is brought pursuant to the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671-80, as a survival action by the administrator and a wrongful death action by the parents of decedent, a member of the New Hampshire National Guard who died while on active duty with the United States Army at Fort Dix, New Jersey. At that post he complained of and received treatment for an abdominal condition. The appellants contend that his death was caused by the negligent treatment received from army doctors. The cause of death was acute peritonitis following a ruptured appendix which allegedly was improperly diagnosed and treated from August 23, 1970 to September 4, 1970.

In *Feres v. United States,* 340 U. S. 135 (1950), the Supreme Court held that the United States is not liable for injuries to servicemen which are sustained while on active duty as a result of negligence of other armed forces personnel. Two of the three cases which were before the Court in *Feres* were medical malpractice cases, and one of these was also a wrongful death action. Thus the case is indistinguishable from this. *Feres* has consistently been followed by the Court of Appeals. *See, e.g., DeFont v. United States,* 453 F. 2d 1239 (1st Cir.), *cert. denied,* 407 U. S. 910 (1972); *Hall v. United States,* 451 F. 2d 353 (1st Cir. 1971) (per curiam); *Henning v. United States,* 446 F. 2d 774 (3d Cir. 1971), *cert. denied,* 404 U. S. 1016 (1971); *Lowe v. United States,* 440 F. 2d 452 (5th Cir.) (per curiam), *cert. denied,* 404 U. S. 833 (1971); *Buckingham v. United States,*

394 F. 2d 483 (4th Cir. 1968) (per curiam); *Dilworth v. United States,* 387 F. 2d 590 (3d Cir. 1967) (per curiam); *Bartley v. DeQuevedo,* 375 F. 2d 72 (3d Cir.), *cert. denied,* 389 U. S. 923 (1967).

The rationale of *Feres* was (1) that the relationship between a soldier and the United States was distinctly federal, while the Federal Tort Claims Act referred, for governing law, to the place where the act or omission occurred, and (2) that there was a federally funded care and compensation system for military personnel. For these reasons the Court concluded that Federal Tort Claims Act should not be construed to apply to armed services personnel for injuries not only in the course of but also arising out of activity incident to service. The appellant argues quite forcibly that the rationale of *Feres* was abandoned by the Supreme Court when it held in *Brown v. United States,* 348 U. S. 110 (1954), that a veteran could recover for the neligent aggravation by Veterans Administration Hospital personnel of a service incurred injury, and in *United States v. Muniz,* 374 U. S. 150 (1963), that federal prison inmates could recover for injuries caused by the negligence of prison supervisors. If the matter were open to us we would be receptive to appellants' argument that *Feres* should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service. But the case is controlling. Only the Supreme Court can reverse it. While we would welcome that result we are not hopeful in view of the number of recent instances in which, having been afforded the opportunity, it declined to grant certiorari. Possibly the only route to relief is by an application to Congress. Certainly the facts pleaded here, if true, cry out for a remedy.

The judgment of the district court will be affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1379

FRANK E. PELUSO, ADMINISTRATOR OF THE ESTATE OF TERRY PELUSO

v.

UNITED STATES OF AMERICA

and

LOUIS J. PELUSO, JR. AND PATSY A. PELUSO

v.

UNITED STATES OF AMERICA

FRANK E. PELUSO, ADMINISTRATOR OF THE ESTATE OF TERRY PELUSO AND LOUIS J. PELUSO, JR. AND PATSY A. PELUSO,
Appellants.

(D. C. Civil Action No. 71-2226.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GIBBONS, and HUNTER, *Circuit Judges* and MUIR, *District Judge*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 7, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:
THOMAS F. QUINN
Clerk

March 6, 1973

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No. 72-1621

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANK E. PELUSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1621

FRANK E. PELUSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are the parents and the administrator of the estate of a deceased serviceman. They instituted this suit under the Federal Tort Claims Act seeking damages resulting from the serviceman's death after surgery in an army hospital, alleging medical malpractice. The district court dismissed the suit on the authority of *Feres* v. *United States,* 340 U.S. 135 (Pet. App. A1). The court of appeals affirmed *per curiam* (Pet. App. A3-A4).

In *Feres,* this Court held that the government is not liable under the Federal Tort Claims Act for the death or injuries of members of the armed forces sustained incident to their service.[1] Like petitioner, two

[1]The Court rejected an interpretation of the Act which would permit tort claims arising out of non-combatant activities (340 U.S. at 138) and emphasized the special compensation system, which normally requires no litigation, provided by Congress for servicemen and their families (*id.* at 144), describing it as "not negligible or niggardly" (*id.* at 145.)

of the claimants involved in *Feres* sustained service-incident injuries allegedly resulting from medical malpractice of military doctors at military hospitals. Since the facts of this case are legally indistinguishable from those in *Feres*, the courts below correctly dismissed petitioners' claim.

There is no occasion for this Court to re-examine *Feres*. Petitioners, claim that *Feres* has been "eroded" and is no longer viable is incorrect and has been expressly rejected by the courts of appeals. See *Sheppard* v. *United States*, 369 F. 2d 272 (C.A. 3), certiorari denied, 386 U.S. 982[2]; *Dilworth* v. *United States*, 387 F. 2d 590 (C.A. 3); see also *Hall* v. *United States*, 451 F. 2d 353 (C.A. 1); *United States* v. *Lee*, 400 F. 2d 558 (C.A. 9), certiorari denied, 393 U.S. 1053.[3] Without exception, decisions of the courts of appeals—like the decisions below in the present case—continue to apply *Feres* in the medical malpractice area. See *e.g.*, *Henning* v. *United States*, 446 F. 2d 774 (C.A. 3), certiorari denied, 404 U.S. 1016;

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[2]The court of appeals stated in *Sheppard* (369 F. 2d at 272):

> The flat statement is made on behalf of appellants in their brief "* * * subsequent decisions of the Supreme Court destroyed the validity of [*Feres*]." Nothing could be further from the true fact.

[3]In *United States* v. *Lee*, *supra*, 400 F. 2d at 561, the Ninth Circuit observed that:

> Congress has not seen fit to amend the Tort Claims Act * * *, permitting the [*Feres*] decision to remain undisturbed for eighteen years. * * * This circuit in *Preferred Insurance Co.* v. *United States*, 222 F. 2d 942; cert. denied, 350 U.S. 837, * * * stated at page 945, concerning the *Feres* case:
>
> > The decision was unanimous and in the more than four years since it was rendered Congress has not amended the Tort Claims Act. Accordingly, the opinion must be accepted as dispelling any doubt as to the congressional intent in the adoption of the Act.

De Font v. *United States,* 453 F. 2d 1239 (C.A. 1), certiorari denied, 407 U.S. 910; *Buckingham* v. *United States,* 394 F. 2d 483 (C.A. 4); *Lowe* v. *United States,* 440 F. 2d 452 (C.A. 5), certiorari denied, 404 U.S. 833.

Furthermore, in *United States* v. *Brown,* 348 U.S. 110, the only decision of this Court since *Feres* involving a serviceman's right to sue under the Tort Claims Act, this Court stated (348 U.S. at 113):

> We adhere * * * to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty.

See also *Johansen* v. *United States,* 343 U.S. 427; *Patterson* v. *United States,* 359 U.S. 495; *United States* v. *Demko,* 385 U.S. 149.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07